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Tennessee Law & Legislation Update

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June 6, 2013

Guns in Trunks Law

- Effective July 1, 2013, employees who have a valid concealed carry permit may possess weapons or ammunition out of sight in their locked vehicle (T.C.A. 39-17-1313(a))
- Four requirements for protection:
 - Legally parked
 - Locked vehicle
 - On business property
 - Weapon is out of sight while person is not in the vehicle

Guns in Trunks Law (cont.)

- Employers who discharge employees “solely” for possessing a weapon in compliance with the statute may face a wrongful discharge claim
- Compare:
 - Lt. Gov. Ramsey and four Senators’ letter in the Senate Journal: Employees “may have a claim for retaliatory or wrongful discharge if the employee is fired just for exercising this right.”
- With:
 - Attorney General Opinion No. 13-41, May 28, 2013: statute does not change the employer’s right to discharge employees for bringing a firearm or ammunition onto employer’s property.
 - The law “does not address and thus has no impact on the employment relationship between an employer and an employee.”
- Lt. Gov. Ramsey’s response: the “Attorney General’s analysis ignores the clear legislative intent.”

Violence in the Workplace

- Employers have a general duty to keep workplace free from recognized hazards likely to cause death or serious physical harm. OSH Act § 5(a)(1)
 - No specific standards relating to workplace violence
 - Voluntary guidance for best practices in at-risk industries such as late-night retailers, for-hire drivers, and healthcare or social workers
- Employers' civil liability limited for damages arising out of others' actions. T.C.A. 39-17-1313(b)
- EEOC has increased focus on disparate impact discrimination stemming from background checks

Wage & Hour Enforcement Reform

- Department of Labor has exclusive authority to enforce state wage and hour laws. Pub. Ch. 240 (2013).
 - Investigate
 - Compel documents and testimony
 - Compel response
 - Enforcement through litigation
- Private cause of action for state wage and hour claims eliminated

Unemployment Reform

- More clearly defined “misconduct” (T.C.A. 50-7-303(b)(3)(A))
 - Violation of company policy automatically establishes misconduct *unless* employee can show he did not know and could not have reasonably known of the policy
 - Employers should publish and re-publish company policies and obtain an annual acknowledgement from each employee
- “Severance pay” is set-off against any potential benefits
- Decision to contest or not contest claims for benefits

State Case Law Developments

Workers' Compensation Coverage

- Shannon v. Roane Medical Center, No. E2011-02649-WC-R3-WC (Tenn. Mar. 13, 2013)
- On-call worker injured returning home from a call back sought workers' compensation coverage for injuries
- Tennessee Supreme Court held the injuries were compensable and not barred by the "going and coming " rule, which would otherwise prevent coverage for injuries sustained traveling to or from work
- Totality of the circumstances – compensation, restrictions, employer benefits, additional travel
- Policy consideration – employee travel that significantly benefits employer and results in greater risk to employee should be compensable under workers' compensation law

Retaliation – Causal Connection

- Ferguson v. MTSU, No. M2012-00890-COA-R3-CV (Tenn. Ct. App. Mar. 28, 2013)
- Court of Appeals overturned \$3,000,000 retaliation verdict against employer because there was no evidence that the decision-maker knew of Plaintiff's prior complaints
- "General corporate knowledge" not enough

Effects of Settlement

- Perkins v. Metro. Gov. of Nashville, 380 S.W.3d 73 (Tenn. 2012)
- Employee filed EEOC Charge and lawsuit and was subsequently discharged
- Employee appealed termination decision, which was eventually settled with an agreement to not seek further employment with the agency that discharged her. The settlement did not compromise the claims in the EEOC Charge.
- Employee then filed another lawsuit alleging retaliatory discharge
- Tennessee Supreme Court held that employee was subjected to an “adverse employment action” to support a retaliatory discharge claim after acceptance of a settlement offer of backpay and agreement not to be reinstated

Employment At-Will

- Petschonek v. Catholic Diocese of Memphis, No. W2011-02216-COA-R9-CV (Tenn. Ct. App. May 23, 2012).
- Employee with written contract for one year term was not an at-will employee even though her contract allowed either party to terminate the contract without cause
- Mutual rights to terminate contract and mutual obligations upon such termination were merely provisions of a definite term contract
- At-will employment is a required element of a retaliatory discharge claim; the remedies for an employee with an employment contract are governed by the contract

Federal Case Developments

Pending Supreme Court Case – Employer Liability

Vance v. Ball State University,
appeal from 646 F.3d 461 (7th Cir. 2011).

- CLAIM:** Employee claimed that co-workers and “supervisors” harassed her based on race; employer sought to avoid liability because harassers were not “supervisors” because they did not have formal authority to take job actions.
- ISSUE:** Whether an employer is liable for harassment by employees with authority to direct and oversee their victim’s work or only those employees who have the power to make employment decisions regarding their victim.
- HOLDING:** Seventh Circuit held that a supervisor must have the authority to hire, fire, discipline, promote, or transfer another worker to impose liability on the employer for harassment.

ADA – Disability and Adverse Employment Action

Lewis v. Humboldt Acquisition Corp.,
681 F.3d 312 (6th Cir. 2013).

CLAIM: Employee claimed she was fired from her RN position in violation of the ADA because she had a medical condition that made it difficult for her to walk and she occasionally required a wheelchair.

Employer claimed she was discharged due to an outburst at work, yelling, using profanity, and criticizing her supervisors.

ISSUE: What is the required causal connection between a disability and an adverse employment action to state an ADA claim?

HOLDING: A plaintiff's disability must be the "but-for" cause of her termination.



ADA Case – Agency Determinations

Smith v. Perkins Board of Education,
No. 12-3187, 2013 U.S. App. LEXIS 4006 (6th Cir. 2013).

CLAIM: Administrative agency found employee was fired for good cause – sleeping at work.

ISSUE: Whether state administrative agency's determination that plaintiff was fired for good cause has preclusive effect in a subsequent ADA case.

HOLDING: No, determination is not binding.



FLSA – Unpaid Time / Reporting

White v. Baptist Memorial Health Care Corp.,
699 F.3d 869 (6th Cir. 2012).

- CLAIM:** Plaintiff claimed she worked during her meal breaks, but hadn't reported it. Plaintiff had occasionally followed the procedure and had been paid in those instances.
- ISSUE:** Whether FLSA plaintiff could recover unpaid time even though she did not follow the employer's procedure for reporting extra time.
- HOLDING:** No, employer had no reason to know plaintiff had worked extra time.

FLSA - Overtime

Foster v. Nationwide Mutual Insurance,
No. 12-3107 (6th Cir. Mar. 21, 2013).

- CLAIM:** Insurance company's special investigators claimed that they were owed overtime; employer classified them as exempt.
- ISSUE:** Whether insurance company's special investigators were properly classified as administrative employees exempt from the overtime requirements of the FLSA.
- HOLDING:** Yes, the employees were exempt.



FMLA – Leave and Title VII - “Cat’s Paw” Theory

Romans v. Michigan Department of Human Services,
668 F.3d 826 (6th Cir. 2012).

- CLAIM:** Employee requested FMLA leave to care for his mother; employer denied the leave because employee was not “needed” because his sister was already caring for their mother.
- ISSUE 1:** Whether FMLA includes leave where another non-ill family member may care for the ill member.
- HOLDING 1:** Yes, “needed to care for” language does not imply strict necessity.
- ISSUE 2:** Whether facts supported a finding of racial discrimination under a “cat’s paw” theory.
- HOLDING 2:** No, independent investigation broke the causal chain.

Title VII – Failure to Promote

Wilson v. Ford Motor Co.,
No. 12-3110 (Feb. 6, 2013).

- CLAIM:** Plaintiff was elected team leader by her employment group, but was not granted the position because she had not been pre-approved as a candidate by the company.
- ISSUE:** Whether Plaintiff stated a claim under Title VII for failure to promote.
- HOLDING:** No. Employer is entitled to set the requirements for positions.



Title VII – Retaliation

Fuhr v. Hazel Park School District,
No. 11-2288 (Mar. 19, 2013).

NOTES: Coach for High School's varsity boys' and girls' basketball teams alleged she was harassed and retaliated against for prevailing in a prior sex discrimination case against the school.

"They are doing this to you to get back at you for winning the lawsuit." – **Not** direct evidence of retaliation.

ISSUE: Whether Plaintiff stated a Title VII retaliation claim.

HOLDING: No. Statement was not specific enough.

QUESTIONS AND ANSWERS

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